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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. PAUL ANTHONY CRUZ, Defendant and Appellant.	H022694 (Santa Clara County Super. Ct. No. 210576)

Defendant Paul Anthony Cruz appeals after conviction, by jury trial, of two counts of lewd acts with a minor (Pen. Code, § 288, subd. (a)) and two counts of aggravated sexual assault on a child (Pen. Code, § 269), with a prior serious felony conviction. He was sentenced to a 65-year prison term.

On appeal, defendant contends the trial court erred by admitting, pursuant to Evidence Code section 1108, evidence of his prior conviction for a violation of Penal Code section 288, subdivision (a). He complains about the jury instructions given with regard to that evidence, and that his counsel was ineffective for failing to object to the admission of the evidence. He contends that the trial court violated his due process rights and right to an impartial jury by not being present during a readback of testimony to the jury during deliberations. He also argues that the sentence imposed was cruel and unusual. Rejecting his arguments in their entirety, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, Jane Doe (Jane), is the defendant's niece. When Jane was five years old, she confided in her parents that defendant had touched and hurt her vaginal area when her family had visited the defendant's house. She also disclosed that the touching had occurred on a previous occasion as well. After first confronting the defendant who denied the allegations, Jane's parents reported the incidents to the police a number of months later.

In an audiotaped interview conducted by a police investigator, Jane described how defendant had pulled her pants down and kissed her "pee-pee" when she was in his bedroom. She also told the investigator that on another occasion defendant stuck his finger inside her "pee-pee," and told her not to tell anyone about the touchings.

At trial, the jury heard both the tape of the police interview and live testimony about these two incidents. Jane testified how she had been in defendant's bedroom, when he pulled her pants and underwear down, and placed his finger in her "private part." As to the second incident, Jane said that she had been playing with defendant's sons, when defendant came into the room and took her into his bedroom. There, he removed her pants, knelt by her as she remained on the bed, and touched her private part with both his lips and hand.

A physical exam of Jane by the Sexual Assault Response Team and tests on her underwear conducted almost three months after the second incident produced no physical evidence. In his defense, defendant presented evidence asserting that Jane's father, who was deceptive and disliked defendant, had fabricated the allegations and implanted them in Jane's mind. Defendant also presented expert testimony on the subject of suggestive questioning and memory, implying that various suggestive interview techniques in this case also served to "implant" a false memory in Jane's mind.

The jury also heard evidence of defendant's prior conviction for child molestation. Court documents were introduced showing that defendant had pleaded guilty to one

charge of lewd and lascivious conduct with a child (Pen. Code, § 288, subd. (a)). Both the police investigator from the previous incident and mother of the molested child testified. The mother testified that defendant was at her home repairing the cable in one of the bedrooms. When she realized that her three-year-old daughter was also upstairs, she went into the bedroom and saw defendant kneeling in front of her daughter whose nightgown was pulled up. The mother observed defendant's hand on the waistband of the girl's underwear, but because she was home alone with her children, she acted as if she saw nothing. The mother further testified that defendant, who appeared nervous, remained kneeling and covered his genitalia, as if he had an erection. After defendant left the home, the little girl told her mother that defendant had pulled down her underwear and touched her genitalia. The jury also heard the taped police interview of the defendant where he admitted to opening the girl's underwear and touching her vaginal area.

The jury convicted defendant on all four counts and found the allegation regarding the prior conviction to be true. After denying defendant's motion to strike the prior conviction, the trial court stayed the sentence as to counts 2 and 4 and sentenced defendant to two consecutive terms of 15 years to life, doubled based on the strike prior, plus an additional five years for the prior serious felony. Defendant timely filed his notice of appeal.

DISCUSSION

Admission of and Instruction on Evidence of the Prior Conviction

Defendant contends that the trial court erred by admitting cumulative evidence of the prior conviction and by failing to instruct the jury on the standard and burden of proof as to the prior conviction. (CALJIC Nos. 2.50.01, 2.50.1.) He also claims that trial counsel was ineffective in failing to object to this cumulative evidence.

During the discussions regarding evidence of prior conduct, trial counsel successfully objected to another uncharged incident and other predisposition evidence. However, as to the prior conviction, counsel chose not to object, stating that such an

objection "would be fruitless." The trial court then ruled that the evidence of the prior conviction would be admitted, stating "the court is going to allow the use of the . . . incident pursuant to Evidence Code section 1108 as well as 1101, subdivision (b) on the issues of intent and plan and design. I am going to find that the probative value of the proposed evidence outweighs the factors that the court has to consider concerning time consumption, confusion of issues and prejudice, extreme prejudice to the defendant. It appears appropriate that it's very probative in the court's view and the court will allow it."

A. *The Trial Court Properly Admitted Evidence of the Prior Conviction*

We review the trial court's ruling on admissibility of evidence of uncharged prior conduct under an abuse of discretion standard. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609; *People v. Branch* (2001) 91 Cal.App.4th 274, 281.) Evidence Code section 1108 permits the prosecution to introduce, in a case where the defendant is charged with a sex offense, "evidence of the defendant's commission of another sexual offense or offenses . . . , if the evidence is not inadmissible pursuant to Section 352."[1] Evidence Code section 1108 "was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a) imposed" upon the prosecution's ability to introduce evidence to prove the defendant's conduct on a specified occasion. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) The statute "implicitly abrogate[d]" prior California Supreme Court decisions holding that admission of propensity evidence was unduly prejudicial to the defense. (*Ibid*.)

Here, as even defense counsel understood, the prior conviction was highly probative because of the similarities between the two incidents. Both victims were very

[1] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

little girls; the victim here was five and the earlier victim was three. The defendant touched the two girls in a very similar manner; in the earlier incident he admitted to touching the little girl's vaginal area with his fingers after pulling down her panties. In the current incidents, Jane stated that defendant touched her vaginal area with his tongue and fingers after pulling down her pants. Additionally, the prior conviction was quite recent, occurring in 1994. The trial court did not abuse its discretion in ruling that the probative value of the evidence outweighed its prejudicial effect.

Relying on *People v. Cardenas* (1982) 31 Cal.3d 897 and *People v. Evers* (1992) 10 Cal.App.4th 588, defendant contends that the evidence presented about the prior conviction was cumulative and therefore, more prejudicial than probative. He argues that any testimony about details of the prior crime beyond the basic evidence of his conviction was too inflammatory and duplicative. We disagree.

In *People v. Cardenas, supra*, 31 Cal.3d 897, the Supreme Court reversed an attempted murder conviction holding that the trial court erred in admitting evidence of gang affiliation. Gang affiliation had no relevance to the crime other than to show the close relationship between the defendant and a witness. Because other evidence had already established this fact, the court held that the prejudicial impact of this duplicative evidence outweighed its probative value. (*Id.* at p. 905.)

In *People v. Evers* the defendant had lied to police about the circumstances surrounding his step-daughters death and had reenacted his fabricated version for the police who videotaped it. At trial, the prosecution played the tape. The court ruled that because the police officer had already testified about how defendant had made up a story which he later recanted, the showing of the videotaped reenactment of the made up story was duplicative. Because of this, the court found the tape more prejudicial than probative, but ruled that the error was harmless. (*People v. Evers, supra*, 10 Cal.App.4th at pp. 600-601.)

Unlike *Cardenas* and *Evers*, each witness and piece of evidence here was complimentary, not duplicative. The victim's mother testified succinctly about the details of the actual incident, her personal observations, as well as her daughter's age and statements. There was no other evidence presented describing the victim's perspective. Unlike *Evers* the officer here did not testify about the contents of the defendant's taped confession, or any of defendant's statements; she testified only to authenticate the tape. The tape itself was the only evidence presented of defendant's version of events and confession, and, therefore, was not duplicative of any other evidence. The court documents were then admitted to show that defendant had, in fact, pleaded guilty, was convicted and served time for the molestation.

Defendant is correct that evidence of his conviction alone would have been less prejudicial than all the detailed testimony the court allowed. However, because of the highly probative nature of this evidence, we cannot agree that the details were more prejudicial than probative. The trial court did not abuse its discretion.

B. ***Trial Counsel Was Not Ineffective for Failing to Object***

Defendant also contends that counsel was ineffective for failing to object to the introduction of this cumulative evidence. In order to establish ineffectiveness of counsel, defendant must demonstrate that counsel failed to act as a competent advocate and that defendant was prejudiced thereby. (*Strickland v. Washington* (1984) 466 U.S. 668.) There can be no incompetence, however, where counsel makes a tactical choice. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.) Here counsel stated on the record he chose not to make an objection because it would be fruitless. Voluntarily avoiding a meritless objection is a tactical choice often made by trial counsel who wish to safeguard their credibility with the trial court. This choice cannot support a claim for ineffective assistance of counsel, where, as here, counsel's credibility was no doubt helpful in excluding other evidence.

Even if counsel had objected, as already discussed above, that objection would have rightly been overruled. Therefore, defendant is unable to establish any prejudice and his claim that trial counsel was ineffective is without merit.

C. *The Court Properly Instructed the Jury*

Defendant complains that the court improperly instructed the jury regarding his prior conviction by giving a modified version of CALJIC No. 2.50.01 and by not giving CALJIC No. 2.50.1. The parties here agreed to modify CALJIC No. 2.50.01 by eliminating the reference to proof of the prior offense by a preponderance of the evidence."[2]

The parties agreed to delete the preponderance language in order to avoid any jury confusion about which standard of proof applied. Although the record is not entirely

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[2] CALJIC No. 2.50.01 usually provides that the prior offense must only be proven by a preponderance of the evidence. The instruction as given reads, "Evidence has been introduced in this case for the purpose of showing that the defendant committed a crime other than that for which he's on trial. Except as you will otherwise be instructed, this evidence, if believed, may be considered by you for the limited purpose of determining if it tends to show a characteristic method, plan or scheme in the commission of the criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged. [¶] For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purpose except as you are otherwise instructed. [¶] Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in this case. . . . [¶] . . . [¶] If you find that the defendant committed a prior sexual offense, you may, but you are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but you are not required to, infer that he was likely to commit and did commit the crimes of which he's currently accused. [¶] However, if you find that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. The weight and significance of the evidence, if any, are for you to decide. Except as otherwise instructed, you mustn't consider this evidence for any other purpose."

clear, they apparently left out CALJIC No. 2.50.1[3] for the same reason. Despite the parties stipulation to this modification, defendant now complains that the instruction is not constitutional, that it "allowed the jury to convict [him] based on proof less than beyond a reasonable doubt," and that it fails to make clear that the prosecution had the burden of proving the prior beyond a reasonable doubt.

Even if defendant's argument were not waived by his explicit stipulation to the modification,[4] (*People v. Lewis* (2001) 25 Cal.4th 610, 638; *People v. Daya* (1994) 29 Cal.App.4th 697, 714) his contention has no merit. In *Falsetta*, the California Supreme Court approved the 1999 revision to CALJIC No. 2.50.01 with the preponderance language, stating, "we think revised CALJIC No. 2.50.01 adequately sets forth the controlling principles under section 1108." (*People v. Falsetta*, supra, 21 Cal.4th 903 at p. 924.) The Supreme Court would not have approved of an instruction, even in dicta, if it had found that the instruction was unconstitutional. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1335.) If the Supreme Court found the instruction constitutional with the preponderance language included, it is equally constitutional with the language removed.

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[3] CALJIC 2.50.1, typically read right after CALJIC 2.50.01, provides, "[w]ithin the meaning of the preceding instruction[s], the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed [a] [crime[s]] [or] [sexual offense[s]] other than [that] [those] for which [he] [she] is on trial. [¶] You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other [crime[s]] [or] [sexual offense[s]]."

[4] Even if the court's failure to give the CALJIC No. 2.50.1 instruction were not part of the stipulated modification, the court did not err in not giving it. The record is devoid of a timely request by defendant for that instruction, and the court has no sua sponte duty to give it. (See Evid. Code, § 403, subd. (c); *People v. Simon* (1986) 184 Cal.App.3d 125, 134; Use Note to CALJIC No. 2.50.1 (6th ed. 1996), p. 92.)

Defendant is correct that by modifying CALJIC No. 2.50.01 and by leaving out CALJIC No. 2.50.1, the court did not specifically instruct the jury on whose burden it was to prove the prior or what standard of proof applied. However, in assessing the propriety of an instruction, we do not view it in isolation. Rather, we consider the modified CALJIC No. 2.50.01 in light of the entire record, including all the instructions and argument by counsel, and then determine whether there is a " 'reasonable likelihood' " the jury understood it could convict defendant under a standard less than beyond a reasonable doubt. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Cain* (1995) 10 Cal.4th 1, 36; *People v. Kelly* (1992) 1 Cal.4th 495, 526.)

In addition to the challenged instruction, the trial court gave CALJIC No. 2.90, which informed the jury that defendant is presumed innocent and entitled to acquittal unless the People prove him guilty beyond a reasonable doubt. The court defined reasonable doubt, and enumerated the elements of each charged offense. The court then gave CALJIC 17.18 which states, "If you find the defendant guilty of one or more of the crimes charged in this case, you must determine whether these allegations [of prior conviction and term in prison] are true. . . . [¶] . . . [¶] *The People have the burden of proving the truth of these allegations. If you have a reasonable doubt that the allegation of the prior conviction is true, you must find it to be not true*. If you have a reasonable doubt about whether the defendant served a term in prison or whether a period of less than five years elapsed . . . , you must find that the allegation . . . is not true." (Italics added.) Finally, the court instructed the jury "not [to] single out any particular sentence or any individual point or instruction and ignore the others. Consider the instructions as a whole and each in light of all the others." (CALJIC No. 1.01.) We presume a jury can understand and follow these instructions. (See *People v. Pinholster* (1992) 1 Cal.4th 865, 919.)

In closing argument, the prosecutor did not argue or suggest that defendant could be found guilty based solely on the evidence of his prior acts, to the contrary, he argued

that proof of the prior only allows the jury to infer a predisposition to commit the sexual offense charged. The prosecutor reiterated that the standard of proof is beyond a reasonable doubt, and enumerated the elements of the crimes charged as well as the evidence supporting the prior offense. Defense counsel, too, discussed in detail the difference between reasonable doubt and other legal standards, stating that reasonable doubt is the highest standard of proof that exists. He emphasized that the prosecutor had the burden to prove guilt beyond a reasonable doubt, and repeatedly argued that the prosecutor had failed to meet his burden.

In light of the fact that the reference to preponderance was deleted, that no other standard but reasonable doubt was ever presented to the jury and that the prosecution's burden was reiterated in a number of contexts in both the instructions and in counsels' closing arguments, we find no reasonable likelihood the jury was confused about the standard or burden of proof as to the priors or that it might have thought it could find defendant guilty by some standard less than beyond a reasonable doubt. (*Estelle v. McGuire*, supra, 502 U.S. at p. 72.) Therefore, the trial court did not err in either modifying CALJIC No. 2.50.01 or in omitting CALJIC No. 2.50.1

Reading of Testimony Outside the Presence of the Judge

During deliberations, the jury asked for a read back of Jane's testimony. Counsel returned to court and stipulated that the reporter could read back the relevant testimony in the jury room. The trial judge was not present in the jury room during the readback. Defendant now contends the absence of the judge during the readback resulted in a denial of his right to due process and the right to a trial before an impartial trial.

Although defense counsel stipulated to the read back in the jury room and did not object when the judge elected to not attend, defendant maintains the issue was not waived for three reasons: (1) defendant did not personally waive his right to the presence of the judge; (2) defense counsel's failure to object was excusable, because he relied on Penal Code section 1138.5 which is unconstitutional; and (3) a defense objection was not

required, since the judge's absence resulted in a deprivation of the jurors' rights. (*Brown v. State* (Fla. 1989) 538 So.2d 833, 834-836 [a deliberating jury requested transcripts of testimony. The judge was advised of the request by telephone. The judge and both counsel agreed that the judge need not return to court to personally inform the jurors that they could not have the transcripts. The Florida Supreme Court held that the presence of the judge must be expressly waived by the defendant rather than his counsel when a communication is received and answered, and judge's absence was reversible error].)

Defendant's reliance on *Brown* is misplaced. In California, a defendant's personal waiver is not required. Our Supreme Court has taken a different position on a criminal defendant's personal waiver of certain constitutional rights. In this state, "counsel has discretion to consent to a reading of testimony outside the presence of the court, counsel, and/or defendant." (*People v. Pride* (1992) 3 Cal.4th 195, 251; *People v. Medina* (1990) 51 Cal.3d 870, 904; *People v. Lang* (1989) 49 Cal.3d 991, 1028; *People v. Bloyd (*1987) 43 Cal.3d 333, 361.)

Defendant next contends that his claim is not waived given that counsel failed to object in reliance on Penal Code section 1138.5 which was controlling, but unconstitutional. This contention is equally unavailing. Penal Code section 1138.5 provides that except for good cause shown, the trial court need not be present "while testimony previously received in evidence is read to the jury." Defendant asserts the statute violates both due process and his right to trial before an impartial jury.

It is settled that with any claim that a statute is unconstitutional, there is a strong presumption of constitutionality, and the courts must resolve doubts in favor of the Legislature's action. (*Broadmoor Police Protection Dist. v. San Mateo Local Agency Formation Com*. (1994) 26 Cal.App.4th 304, 309-310.) Here, we can reasonably presume that the Legislature enacted the statute for the purpose of maximizing judicial economy and efficiency while according full protection to the legal rights of the parties.

The balance stricken by the Legislature between these two interests is not unconstitutional. "[T]he readback of testimony is not a critical stage of the proceeding; . . ." (*People v. Rhodes* (2001) 93 Cal.App.4th 1122, 1124.) It is a ministerial act during which the court's presence is seldom necessary.[5] Further, before such read back occurs, the jury has relayed to the court its requests for certain testimony, and the court, with input from attorneys, has made its discretionary decision as to what portions of testimony should be read back to the jury. (Pen. Code, § 1138.) "Where the judge controls the process, nothing in logic, reason, due process or law, or the right to a trial before an impartial jury compels the judge to be present with the jurors while testimony previously received in evidence is read to them upon their request." (*People v. Rhodes, supra,* 93 Cal.App.4th at p. 1124.)

There is nothing in the record here indicating that the trial judge failed to "control the process." There is no indication that he failed to exercise his discretion regarding the readback, or that he was not available, had any questions from the jurors to the court arisen during the readback of testimony. Because Penal Code section 1138.5 and its application here are constitutional, it cannot save defendant from having waived this claimed error.

We also reject defendant's suggestion that the judge's absence violated rights belonging to the jurors. Even if we were to assume some jury rights were affected by the

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[5] Defendant's reliance on *People v. Tupper* (1898) 122 Cal. 424 and *People v. Blackman* (1899) 127 Cal. 248, is misplaced. In those cases, the judges left the court during closing argument, and our Supreme Court reversed the judgments. However, argument, unlike a readback of testimony, bears a substantial relation to the defendant's opportunity to defend. (See *People v. Douglas* (1990) 50 Cal.3d 468, 517-518, abrogated on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907.) During argument, the court is called upon to make discretionary decisions and to rule on possible objections. In contrast, the judge's presence for a readback of testimony is unnecessary, absent a special problem.

absence of the judge, defendant lacks standing to raise the issue. (See *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1212.)

Finally, even if the defendant had not waived this claim, based on the authorities and facts discussed above, the trial judge was not required to be present during the readback of testimony and therefore did not violate any of defendant's rights by his absence.

Cruel and Unusual Punishment

Defendant contends that imposition of a term of 65-years-to life constitutes cruel and/or unusual punishment in violation of the state and federal Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) He contends that the imposition of the enhanced sentence pursuant to Penal Code section 667, in his case, constitutes cruel or unusual punishment, because it is grossly disproportionate to the crimes committed.

A punishment is considered cruel and unusual when a penalty is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) "Whether a particular punishment is disproportionate to the offense is, of course, a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible. The judiciary, accordingly, should not interfere in this process unless a statute prescribes a penalty 'out of all proportion to the offense' [citations], i.e., so severe in relation to the crime as to violate the prohibition against cruel or unusual punishment." (*Id*. at pp. 423-424.)

A defendant bears the burden of establishing that the punishment prescribed for his offense is unconstitutional. (*People v. King* (1993) 16 Cal.App.4th 567, 572.) The California Supreme Court has "identified three techniques used by the courts to focus the

inquiry: (1) an examination of 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society'; (2) a comparison of the challenged penalty with those imposed in the same jurisdiction for more serious crimes; and (3) a comparison of the challenged penalty with those imposed for the same offense in different jurisdictions. [Citation.]" (*In re Reed* (1983) 33 Cal.3d 914, 923, quoting *In re Lynch, supra*, 8 Cal.3d at pp. 425-429.)

Defendant argues that neither he nor the nature of his offense warrant the sentence imposed. A brief review of the facts reveals the contrary. Defendant had previously been convicted and served a prison term for molesting a three-year-old girl. Within less than three years of his release from prison, defendant again sexually assaulted a child. This time he used his position of trust to sexually assault his niece on more than one occasion while she was visiting his home and her parents were nearby. His conduct not only indicates an inability to control his sexual compulsion towards small girls, but proves that his previous imprisonment failed to modify his behavior.

Defendant claims that "there was nothing about these offenses that made them any worse than other offenses of the same kind. There was no violence or suggestion of kidnapping. The child was not injured. The assaults appear to have been brief and as untraumatic as such an offense could be." We cannot agree.

Defendant's suggestion that the child was "not injured" unduly elevates and then emphasizes the lack of evidence of physical harm. But the real injury in these cases is often psychological and frequently serious. We need not cite the volumes of literature which confirm the grave, long term effects of molestation on children, to be able to state with certainty that the injury here is as definite as it is immeasurable. While any physical signs may have quickly healed, the child's emotional and psychological injury cannot be discounted.

Nor does the fact that the assaults were "brief" help the defendant. It is not the duration of the offense, but it is impact on the victim, which best defines the nature of the

crime. There is no question that the impact on the victim was substantial and long-lasting.

Defendant also maintains that his current offense was not violent. However, defendant "was punished not just for his current offense but for his recidivism. Recidivism justifies the imposition of longer sentences for subsequent offenses. [Citation.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 825.) In *Rummell v. Estelle* (1980) 445 U.S. 263. 284-285, the United States Supreme Court reasoned that society is warranted in imposing increasingly severe penalties on those who repeatedly commit felonies. If increased penalties do not deter the repeat offender, then society is warranted in segregating that person for an extended period of time. Given the nature of the offense and the offender, we conclude that imposition of the 65-years-to-life prison term does not " 'shock the conscience' " on this record. (*In re Lynch, supra*, 8 Cal.3d at p. 424.)

Because defendant does not argue that his punishment for sexual assault on a child with a prior strike is disproportionately greater than the punishment imposed for more serious crimes accompanied by a strike conviction in this or other jurisdictions, we will not address this issue. However, we note that other courts have previously found life sentences proportionate for those convicted of similar offenses. In *People v. Diaz* (1996) 41 Cal.App.4th 1424, 1431, the defendant, who had previously been convicted of 15 counts of molesting his step-daughter, was convicted of molesting and annoying a 13-year old child after he masturbated next to her and touched her thigh in a movie theatre. The court did not find it cruel and unusual to sentence the defendant to a life term; holding that where defendant's recidivist behavior consisted of "unremitting sexual depredation of a child" it justified the imposed punishment. (*Ibid.*)

Since defendant's prior and present convictions for child molestation together are responsible for his punishment in this case, a sentence of 65 years-to-life is not cruel and unusual.

DISPOSITION

The judgment is affirmed.

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RUSHING, J.

WE CONCUR:

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BAMATTRE-MANOUKIAN, ACTING P.J.

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MIHARA, J.